

1886

IN RE
NOBODERP
CHUNDER
SHAW.

NORRIS, J.—I do not think it necessary that I should take time to consider what judgment I should give in this case, or encumber the record with an elaborate investigation of the older authorities in a case where the question is set at rest by the decision of the Appeal Court in *Ex parte Jones* (1), the principle of which was adopted in the Court of Appeal in Ireland in the case of *In re Rainys* (2). It seems to me that the provisions of the Contract Act are much stronger than the Infants Relief Act, a provision which formed the basis of the decision in *Ex parte Jones*. I therefore think this adjudication should be set aside.

Rule absolute.

Attorney for petitioner: Baboo G. C. Chunder.

Attorneys for adjudicating creditors, Messrs. Sen & Co.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

ABOOL HOSSEIN (PLAINTIFF) v. RAGHU NATH SAHU (DEFENDANT.)*

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March 30.

Registration—Notice—Mortgagor and Mortgagees—Unregistered mortgage—Purchaser with notice of prior unregistered mortgage—Priority.

Where property has been mortgaged by a deed, the registration of which is not compulsory, a subsequent purchaser of the property, who has duly registered his purchase deed, but who has bought with notice of the unregistered mortgage, takes the property subject to that mortgage.

THIS was a suit instituted on the 7th February 1884 to recover the sum of Rs. 86-15-0, being Rs. 50 principal and Rs. 36-15-0 interest due on a mortgage bond executed by the defendant Raghu Nath Sahu, on the 12th of December 1877. The bond had not been registered. It appeared that Raghu Nath Sahu had, on the 29th of January 1884, sold the mortgaged property by a registered deed of sale to one Mahadeo, who was made a defendant on the 18th of April 1884.

* Appeal from Appellate Decree No. 1990 of 1885, against the decree of Baboo Ram Pershad, Subordinate Judge of Patna, dated the 30th of June 1885, affirming the decree of Moulvi Abdul Bari, Khan Bahadur, Munsiff of Patna, dated the 23rd of February 1885.

(1) L. R., 18 Ch. D., 109.

(2) 3 Ir. L. Rep. Ch. 459.

The plaintiff adduced evidence to prove that Mahadeo had, previous to his purchase, notice of the plaintiff's mortgage, but the lower Appellate Court held that the question of notice was immaterial, as the defendant Mahadeo's registered deed was entitled, notice or no notice, to priority over the plaintiff's unregistered deed. The plaintiff appealed to the High Court.

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Baboo *Saligram Singh* for the appellant.

Baboo *Karuna Sindhu Mookerjee* for the respondent.

The judgment of the Court (PIGOT and O'KINEALY, JJ.) was delivered by

PIGOT, J.—The question in this case which arose before both the lower Courts was, whether, when there is an unregistered mortgage, the registration of which is not compulsory, a purchaser of the property who has registered his deed of sale, but who has bought with notice of the unregistered mortgage, purchases subject to the mortgage: the Courts below held that such notice is immaterial, taking that view in consequence of what they understood to be the effect of the judgment of Mr. Justice Field in *Bamasandari Dassi v. Krishna Chundra Dhur* (1). In that case Mr. Field expressed the opinion that the effect of the decisions in the cases of *Fuzladdeen Khan v. Fakir Mahomed Khan* (2) and of *Narain Chunder Chuckerbutty v. Dataram Roy* (3), was not, in his opinion, to decide the point, the observations in those decisions being no more than *obiter dicta*; and the case of *Denonath Ghose v. Aluck Moni Dabi* (4) not having been decided by both members of the Court on the ground of notice.

Now, it is to be observed that Mr. Justice Field, in *Bamsundari Dassi's case* (1) says, at the bottom of page 427 * * *: "We think that in the present case the question does not really arise." The learned Judge's decision, therefore, does not amount, in our opinion, to a decision upon the effect of the judgments in the other cases; the learned Judge was careful to point out that there was no proof or reasonable presumption of notice in the case; and that,

(1) I. L. R., 10 Calc., 424.

(2) I. L. R., 5 Calc., 336.

(3) I. L. R., 8 Calc., 597.

(4) I. L. R., 7 Calc., 753.

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therefore, the question did not arise—see again at page 428. In the recent case of *Bhalu Roy v. Sukhu Roy* (1), the question was raised and expressly decided, that in such a case as the present, the purchaser with notice takes subject to the mortgage. We think that that principle must be taken to be the principle of this Court, having regard to the cases referred to by Field, J., and further to the case of *Nemai Charan Dhabal v. Kokil Bag* (2), where Mr. Justice Mitter followed the case of *Waman Ramchandra v. Dhondika Krishnaji* (3). According to these cases a person who purchases with notice of a contract for the sale of property, not requiring registration, and unregistered, purchases subject to the rights of the person with whom the contract has been entered into. We see no difference between the principle in the one case and that in the other; and we may add that the passage from Lord Cairn's judgment in *Agra Bank v. Barry* (4) cited in the Bombay case is one to which attention may well be invited. It lays down the principles applicable to a question of this sort. The decision of Lord Cairns is upon the Irish Act, one very similar in terms to the Indian Registration Act, and identical in principle with it.

We must remand this case, therefore, for we cannot find that the learned Subordinate Judge has come to a definite finding, aye or no, whether Mahadeo had notice of the mortgage. We express no opinion ourselves upon the evidence as to this question. We remand the case to the Subordinate Judge for a finding upon that question. The case will be kept on the file, and the record will be sent down with this judgment, and the Subordinate Judge will return his finding within three weeks from the receipt of this order.

P. O'K.

Case remanded.

- (1) I. L. R., 11 Calc., 667.
- (2) I. L. R., 6 Calc., 534.
- (3) I. L. R., 4 Bom., 126.
- (4) L. R., 7 H. L., 135.